ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2003

Mr. Carlyle H. Chapman, Jr.
Locke, Liddell & Sapp, L.L.P.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

OR2003-8905

Dear Mr. Chapman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191816.

The Dallas Museum of Art (the "DMA") received a request for all records pertaining to charges of discrimination against the DMA alleged by the requestor and any other DMA employee within the past five years. You claim that the Public Information Act (the "Act") does not apply to the requested information because the DMA is not a governmental body under the Act in the present instance. In the alternative, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Chapter 552 is only applicable to public information. *See* Gov't Code § 552.021. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Thus, the Act applies to the records of a "governmental body." Section 552.003(1)(A) of the Government Code defines "governmental body" as an entity that spends or is supported in whole or in part by public funds. "Public funds" means funds of the state or of a governmental subdivision of the state. Gov't Code § 552.003(5).

When considering the scope of the definition of "governmental body" under the Act, this office has distinguished between private entities receiving public funds in exchange for specific, measurable services and entities receiving public funds as general support. This office previously examined the status of the DMA as a governmental body in Open Records

Decision No. 602 (1992). The contract between the DMA and the City of Dallas (the "city") required the city to support the DMA by maintaining the museum building, paying for utility service, and providing funds for other costs of operating the museum. In that decision, this office noted that an entity receiving public funds is a governmental body under the Act unless its relationship with the governmental body imposes "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." Open Records Decision No. 602 (1992); *see also* Open Records Decision No. 228 (1979) (private, nonprofit corporation, with purpose of promoting the interests of the area, that received general support from City of Fort Worth was governmental body). The decision also noted that "the [city] is receiving valuable services in exchange for its obligations, but, in our opinion, the very nature of the services the DMA provides to the [city] cannot be known, specific, or measurable." *Id.* Thus, this office determined that the city provided general support of the DMA facilities and operation, making the DMA a governmental body under the Act, to the extent it receives public support. Therefore, the DMA's records relating to the programs supported by public funds were found to be subject to public disclosure. *Id.*

In the present case, you assert that "the factual circumstances regarding the nature of the relationship between the DMA and the City of Dallas have changed significantly since the 1992 Open Records decision such that the DMA's position as a 'governmental body' should be reevaluated." You have submitted for our review (1) a copy of the current contract between the DMA and the city, and (2) a copy of the contract in existence between the DMA and the city at the time Open Records Decision No. 602 was issued.

Upon review of these documents, we find that although the amounts have changed, the "scope of services" in the current contract and other contractual terms concerning support and funding are substantially similar to that set forth in the former contract. We do not find that the nature of the services provided by the DMA to the city have changed in a way that makes them more "known, specific, or measurable" than they were in 1992. Consequently, we determine that the DMA is a governmental body to the extent that it receives the city's and state's support. *See* Open Records Decision No. 602 at 5 (1992). Information relating to areas of the DMA that are publicly funded by the city and state is, therefore, subject to the Act.

The submitted information responsive to the present request for information relates to allegations of discrimination against the DMA by four individuals. You have informed this office that two of the four individuals were never paid using public funds received from the city. Therefore, as the positions of these individuals at the DMA were not directly supported by the city, the information in Exhibits G, H, L, and M is not subject to the Act and may be withheld by the DMA. *See id.* at 4.

With regards to the two remaining individuals, you state with certainty that "a part of these salaries was paid by the City of Dallas." You also state that whether these individuals'

salaries were paid by the city or by the DMA was determined on a monthly basis and depended on a variety of factors. You assert that information in Exhibits I, J, and K, which relates to these individuals, is not subject to the Act because "the City does not provide direct support for the portion of the DMA responsible for responding to and investigating charges of discrimination." We find, however, that information held by the DMA that relates to employees supported by public funds is subject to the Act. Open Records Decision No. 602 at 5 (records related to salaries of those employees for whom the city pays a portion are subject to the Act). Therefore, we will address your claimed exceptions to disclosure specific to Exhibits I, J, and K.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indust. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The information you seek to withhold under sections 552.101 and 552.102 relates to the work behavior and job performance of department employees, and as such cannot be deemed outside the realm of public interest. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, based on our review, we conclude that Exhibits I, J, and K are not protected from disclosure under sections 552.102 and 552.101 in conjunction with common-law privacy.

You assert that portions of Exhibit J are excepted from disclosure under the common-law informer's privilege. Section 552.101 incorporates the common-law informer's privilege into the Act. This privilege has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

In this case, you have neither indicated which laws are alleged to have been violated nor have you demonstrated that the alleged violations would result in a civil or criminal penalty. Also, the accused person knows the informer's identity because he wrote his complaint to her. Thus, we find that the DMA has not adequately demonstrated that the informer's privilege is applicable in this instance. *See, e.g.*, Open Records Decision Nos. 542 (1990) (concluding that Public Information Act places on a governmental body the burden of establishing why and how an exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Consequently, the DMA may not withhold any portion of Exhibit J pursuant to section 552.101 and the informer's privilege.

You assert that Exhibit K is excepted from disclosure under the work product privilege as set forth in the Texas Rules of Evidence. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. You have not demonstrated that the DMA prepared the information in Exhibit K for trial or in anticipation of litigation. Therefore, Exhibit K may not be withheld under section 552.111 as attorney work product.

You assert that Exhibit I includes information that is excepted under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the DMA may only withhold the home address and telephone number under section 552.117 on behalf of the current or former employee if the employee elected to keep his information confidential pursuant to section 552.024 prior to the date on which the request for this information was made. The DMA may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

In summary, Exhibits G, H, L, and M are not subject to the Act and may be withheld by the DMA. The DMA may be required to withhold the marked information in Exhibit I under section 552.117. The remaining information in Exhibits I, J, and K must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Amy Peterson

Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 191816

Enc. Submitted documents

c: Mr. Jeffrey J. Williams
4254 East Highway 80, #2144
Mesquite, Texas 75149
(w/o enclosures)